88-1468

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, *Petitioner,*

v.

AMOCO OIL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 6, 1989

QUESTIONS PRESENTED

1. Has the United States Court of Appeals for the Seventh Circuit improperly established a precedent in this case which effectively repeals or modifies the burden of proof requirements under the Petroleum Marketing Practices Act (15 U.S.C. Sec.2805(c)) and which is in direct conflict with the Tenth Circuit's and the Eleventh Circuit's interpretations of the Act?

2. Is the decision of the United States Court of Appeals for the Seventh Circuit so clearly erroneous for failing to consider 15 U.S.C. Sec. 2805(e) in upholding the application of the issue preclusion doctrine that reversal by this Honorable Court is warranted?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Donald V. Johnstone, and the Respondent, Amoco Oil Company. Respondent, Amoco Oil Company, is not known to have any parent companies or partially owned subsidiaries to list pursuant to Rule 28.1.

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[**Ed. Note:** This Petition is accompanied by a seperately bound Appendix which contains its own Table of Contents.]

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IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1989

DONALD V. JOHNSTONE, Petitioner,

v.

AMOCO OIL COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioner Donald V. Johnstone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as Amoco Oil Company v. Johnstone, 856 F.2d 967 (7th Cir., 1988), and is reprinted in the appendix hereto,

p. 1a, infra.

The memorandum decision of the United States District Court for the Southern District of Indiana (Noland, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 19a, infra.

JURISDICTION

Amoco Oil Company brought this suit against Donald V. Johnstone for ejectment in the United States District Court for the Southern District of Indiana. The jurisdictional basis for that claim was the diversity of the citizenship of the parties and an amount in controvery in excess of $10,000, pursuant to 28 U.S.C. Sec. 1332. The District Court's jurisdiction was also founded upon the Declaratory Judgment Act, 28 U.S.C. Sec. 2201-02, and under 15 U.S.C. 2801, et seq. Judgment was rendered by the District Court and an appeal was taken by the petitioner to the Court of Appeals for the Seventh Circuit.

On September 14, 1988, the Seventh Circuit affirmed the decision of the District Court. A Petition for Rehearing was filed by the petitioner and was denied on December 7, 1988.

The jurisdiction of this Court to review the decision of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Selected, pertinent sections of 15 U.S.C. Sec. 2801, et seq. **Petroleum Marketing Practices Act** are presented herein as follows:

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may --

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date

on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

* * *

(b)(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

* * *

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if --

(i) such determination is --

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable

changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either --

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

* * *

§2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship,

the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship --

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

* * *

Manner and form of notification

(c) Notification under this section --

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain --

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

* * *

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of --

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b) (1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

* * *

Burden of proof; burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled --

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that --

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business --

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located; or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been compiled with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(Pub.L. 95-297, Title I, § 105, June 19, 1978, 92 Stat. 331.)

STATEMENT OF THE CASE

Johnstone has been an Amoco service station dealer for approximately seventeen years. Until 1987 he had operated two Amoco service stations in Indianapolis. One of the stations was referred to as the "Nora Station", and the other as the "Belle Meade Station". Presently, Johnstone operates only the Belle Meade Station since his operation of the Nora Station was terminated pursuant to the decision in this case below. During all times relevant to this case, the real estate upon which the stations were located were owned by third parties. Amoco owned the improvements on those properties and leased the premises in turn to Johnstone.

In 1984 Johnstone commenced an action against Amoco unrelated to the case at bar seeking a declaratory judgment that a provision of a rider to the Dealer Supply Agreement between the parties known as the Meter

Marketing Plan ("MMP") Rider was violative of the Indiana Deceptive Franchise Practices Act which prohibits contract provisions that allow for a subtantial, unilateral modification of a franchise agreement without the consent of the franchisee. The action was commenced by Johnstone in state court but was removed to federal court by Amoco. **That action did not involve any issues relating to the federal statute known as the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. 2801, et seq.**

While the MMP case was pending, Amoco gave notice to Johnstone of its intention to terminate or nonrenew its lease and other related agreements for the Nora Station. The notice given was pursuant to the notice requirements of the PMPA. Amoco also gave Johnstone an offer to sell its interests in the premises to him. Such an offer was required by the terms of the PMPA (Sec. 2802(b)(3)(D)(iii)). Johnstone and his counsel

commenced negotiations with Amoco at that point concerning the terms of the offer.

The negotiations between the parties for the sale of Amoco's interests continued, but on May 19, 1986, Amoco filed this action below seeking the ejectment of Johnstone from the premises. Three days later, on May 22, 1986, trial was conducted in the MMP case. (Johnstone had not been served with this lawsuit until well after the MMP trial had concluded.) On March 18, 1987, the Honorable S. Hugh Dillin, who heard the MMP case, issued a judgment in Amoco's favor. That judgment was accompanied by his Findings of Fact and Conclusions of Law. See p. 39a, infra.

The MMP judgment is relevant to this case in two respects:

(1) The findings of fact included findings that the terms of the Dealer Supply Agreement and its related lease and riders

(collectively referred to as the "franchise agreement") had "terminated" for the Nora Station, and that Amoco had given notice of its intention not to renew the franchise agreement for the Nora Station "in accordance with the provisions of the [PMPA]"; and

(2) The conclusions of law included a conclusion that "All issues involving the validity of the [MMP provisions] for the Nora Station are moot."

Following the filing of the complaint in this case by Amoco, Johnstone filed a Counterclaim alleging (1) that Amoco had not complied with the PMPA in not renewing Johnstone's Nora Station franchise, and (2) that he was entitled to specific performance of a contract he claimed was formed between the parties for the sale, by Amoco, of its interests in the Nora Station. On the day of trial in this case Amoco moved the District Court to preclude from the trial any

consideration of issues relating to compliance by Amoco with the PMPA. The Honorable James E. Noland held that the doctrine of issue preclusion estopped the re-litigation of any PMPA issues. See p. 19a, infra. The trial continued on the only remaining issue and judgment was entered in Amoco's favor. The District Court's judgment in this case was accompanied by a Memorandum Decision. See p. 19a, infra.

In due course, the petitioner took his appeal to the Seventh Circuit on the issue of whether the District Court improperly precluded the trial on the PMPA issues. Johnstone argued on appeal that the District Court had improperly applied the issue preclusion doctrine, and complained that because of the District Court's ruling, he never had his day in court despite the intent of the PMPA, which has been referred to as the "Dealer Day in Court" bill. (Cong. Record, May 5, 1978,

p.s.12761-62 (Statement of Senator John Durkin).)

The Seventh Circuit addressed the issue preclusion doctrine and, like the District Court, rejected Johnstone's argument that that doctrine was improperly applied.

REASONS FOR GRANTING THE WRIT

I.

The decision below upholding the District Court's application of the issue preclusion doctrine, despite the clear provisions in the Petroleum Marketing Practices Act respecting a franchisor's burden of proof, significantly hinders the effective administration and enforcement of the Act, undermines the Act's remedial intent, and establishes precedent which conflicts with the Act and with other Circuits which have considered that portion of the Act.

The Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq. ("PMPA") is a remedial statute enacted into law in 1978, the purpose of which is "...aimed at halting the steady decline in the number of small businessmen who can continue to compete in the retail gasoline

marketplace." [Cong. Record, May 5, 1978, p.s. 12761-62 (Statement of Senator John Durkin).] The PMPA has not once been the subject of a case heard by the United States Supreme Court. This instant case presents issues which have been erroneously resolved by the Seventh Circuit Court of Appeals in such a way as to have substantially weakened the efficacy of the PMPA and thus rendered significant parts of it ineffective without a valid judicial determination of any issue concerning its constitutionality.

In the case below, the District Court precluded from consideration at trial Johnstone's claims that his termination as a dealer at the Nora Station was improper under the terms of the PMPA. The District Court ruled that all claims relating to the PMPA were precluded by a finding made in the MMP case. In applying the doctrine of "issue preclusion" (otherwise referred to as collateral estoppel)

the District Court failed to carry out the remedial provisions of PMPA. Moreover, the affirmation of the District Court decision by the Seventh Circuit has, in this particular case and through its precedential effect in all future PMPA cases, voided certain aspects of the PMPA; namely, the defined burden and adequacy of proof imposed upon the franchisor -- proof which is not so much an evidentiary standard as it is a part of the substantive remedy which PMPA does provide and was intended to provide.

In order to best understand the significance of this case on the PMPA, a brief review of the Act and its purpose is i order. No one can dispute that the purpose of the PMPA was to protect service station dealers, jobbers, and other "franchisees" from "arbitrary or discriminatory termination or non-renewal of their franchises" by the much larger oil companies ("franchisors").

S.Rep.No. 95-731, 95th Cong., 2d Sess. 15, reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874 ("Senate Report"). The PMPA generally prohibits the termination or nonrenewal of franchise agreements between petroleum franchisors and franchisees. The Act then carves out certain exceptions to the general rule and sets forth conditions for an effective termination or nonrenewal. Strict compliance with these conditions and exceptions is required or else termination or nonrenewal is ineffective and can subject the franchisor to injunctive relief and/or other equitable and legal remedies.

Section 2802 of the PMPA identifies the acceptable grounds for termination and nonrenewal of a franchise agreement, and Section 2804 sets forth the notice requirements which must be followed by a franchisor if the termination or nonrenewal is to be effective. While restricting the general contractual

relationship which existed between oil companies and dealers before PMPA was enacted, the Act nevertheless preserves the flexibility of franchisors to make bona fide business decisions respecting its franchises.

> "The statutory scheme of the PMPA seeks to strike a balance between the interests of the participants in a petroleum marketing franchise relationship. Congress recognized the disparity of bargaining power between franchisor and franchisee and the harsh consequences of suddenly terminating a business for which the franchisee has worked long and hard to develop goodwill. See 123 Cong.Rec. 10386 (1977) (remarks of Rep. Mikva). Echoing those concerns, the PMPA commits gasoline franchisors to a franchise marriage of sorts, the dissolution of which is available only on specific grounds. While most of the grounds relate to serious franchisee misconduct, others reflect an intent to permit the franchisor to exercise reasonable business judgment.
>
> * * *
>
> As the statutory scheme shows, 'the grounds specified as justification for termination or nonrenewal of a franchise are intentionally broad enough to provide franchisors the flexibility which may be needed to respond to changing market conditions or consumer preferences,' id. at 10383 (remarks of Rep. Dingell), yet

> are not 'so broad as to deny franchisees meaningful protections from arbitrary or discriminatory terminations and nonrenewals or to prevent fulfillment of the reasonable renewal exceptions of franchisees,' Senate Report at 18, U.S. Code Cong. & Ad. News at 877."

Brach v. Amoco Oil Company, 677 F.2d 1213 (7th Cir., 1982).

It was not mere happenstance that the PMPA specifies in plain terms the allocation of proof burdens in a PMPA case. Section 2805(c) of the Act provides that once the franchisee has proven that a termination or nonrenewal has occurred, the burden of proof shifts to the franchisor to show that proper notice has been given to the franchisee and that the grounds for termination or nonrenewal are permissible under PMPA. Indeed, the authors of the PMPA made it clear that the provisions placing the burden of proof on the shoulders of franchisors was a key tool to carry out the remedial intent of PMPA to protect franchisees; a major concern of Congress was the disparity of litigation

resources between a local gasoline retailer on the one hand, and a giant international oil company on the other.

The PMPA's primary author and floor manager was Representative John Dingell. Upon bringing PMPA to the floor of the House of Representatives, he stated:

> "I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or nonrenewal of a franchise are intentionally broad enough to provide to franchisors the flexibility which may be needed to respond to changing market conditions or consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections which this Federal legislation is intended to provide and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms. The burden of proof is placed upon the franchisor to prove compliance with the requirements of the legislation. In addition, because the franchisee's rights must be preserved, pending litigation, if his ultimate victory is to be meaningful, preliminary injunctive relief is made available to the franchisee as a matter of right upon a minimal showing.

> The key to this legislation is the balance which is struck by including flexibility in the grounds which justify termination or nonrenewal and simultaneously requiring that the franchisor prove to an impartial arbiter, a Federal court judge, that permissible grounds for termination or nonrenewal do in fact exist. Franchisee rights under this bill are, as a result, more meaningful than limitations on franchisor conduct, provided in some State laws, which are arguably more stringent. The theoretical protections afforded by these State laws are often not enforceable in practice, due to the procedural advantages enjoyed by the franchisor."

123 Cong. Rec. p. H20383 (4/5/77).

Since PMPA pointedly changes the burden of proof from what would otherwise exist, it met with predictable resistance from the major oil companies during Congressional debate on the bill. In fact, Amoco itself complained that,

> "[The PMPA] shifts the burden of proof in lawsuits to the refiners and distributors who are being sued. This departs from basic judicial practice, where plaintiffs must bear the burden of proof. It is a touch of partnership which accentuates the bill's lack of balance."

[Hearings Before the Subcommittee on Energy and

Power of the Committee on Interstate and Foreign Commerce, on HR 130, Petroleum Marketing Practices Act, Serial No. 95-51 (9th Cong., 1st Session, at p. 346)].

Obviously, then, the burden of proof provisions of the PMPA cannot be taken lightly or ignored by the courts. To do so is to undermine and render void an important remedial function of that legislation. "As remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect franchisees. See, United States v. Bacto - Unidisk, 394 U.S. 784, 798, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 776 (1969); [other citation omitted.]" Brach, at 1221.

In the instant case the PMPA burden of proof provisions have been assaulted by Amoco, using the doctrine of issue preclusion as the weapon of choice. The District Court and the Seventh Circuit Court of Appeals have both condoned this assault by their rulings, and the

precedential effect of those rulings will judicially modify the standards clearly set forth by Congress.

These findings of fact and conclusions of law in the MMP case, by themselves, form the basis for the District Court's finding in the present case that the issue preclusion doctrine prevented the litigation of any issues relating to Amoco's compliance with the PMPA:

> **"Findings of Fact**
>
> * * *
>
> 2. The [Dealer Supply Agreement] and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986.
>
> 3. By letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the [PMPA]." (p. 40a, infra); and
>
> * * *
>
> **"Conclusions of Law**
>
> 1. All issues involving the validity of the provisions of the [MMP]

Rider for the Nora Station are moot." (p. 44a, infra)

Apart from the clearly erroneous decision by the Seventh Circuit -- a point that will be discussed further below -- the Seventh Circuit has either ignored or misinterpreted the PMPA provisions requiring Amoco to carry the burden of proof to show that it had complied in all respects with the PMPA.

Section 2805(c) of the PMPA states,

> "The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title."

This requires, therefore, that Amoco prove that:

(1) It had proper grounds for the termination and nonrenewal of Johnstone's franchise (See 2802(b)(1)(B)); meaning that the grounds alleged in its letter of termination or nonrenewal to Johnstone -- namely, that Amoco

determined renewal was likely to be uneconomical to Amoco despite any reasonable changes or additions (§2802(b)(3)(D)(i)(IV)) -- were bona fide grounds founded in fact;

(2) It did not make the determination referred to above for purposes of converting the premises to a company-operated station (§2802(b)(3)(D)(ii));

(3) Since the Nora Station involved leased marketing premises, it made a bona fide offer to Johnstone to sell, transfer, or assign its interests in those premises. (§2802(b)(3)(D)(iii)); and

(4) It gave proper notice to Johnstone as required by §2804.

Amoco did not prove any of these elements with the exception, perhaps, of the fourth. Amoco contended, Johnstone conceded, and the District Court in the MMP case found that "[b]y letter dated November 15, 1985, Amoco gave Johnstone notice of its intention to terminate

or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the [PMPA]." [emphasis added.] (p. 40a, infra.)

Yet, the Seventh Circuit found that, despite the proof requirements imposed by the PMPA, the doctrine of issue preclusion controlled and that the findings and conclusion of the District Court in the prior MMP case must be construed as a determination that this extensive proof requirement had been met. In effect, the decision of the Seventh Circuit has held that it is not necessary for there to be specific findings on each element of proof required of the franchisor.

In the Seventh Circuit decision below the Court disposed of this glaring contradiction between the PMPA proof requirements and its application of the issue preclusion doctrine thusly:

"Johnstone then argues that the findings

were not enough because '[n]o finding of fact was made with regard to any factual issue necessary to determine if the notice of termination or nonrenewal was upon proper grounds or whether Amoco's offer to sell its interests in the premises to Johnstone was a 'bona fide offer' as required by he [sic] PMPA.'

"In Frye [v. United Steelworkers of America, 767 F.2d 1216 (7th Cir.), cert. denied, 474 U.S. 1007 (1985)], we considered an analogous situation and stated that [e]ven if there were other facts that could have been presented at [trial] the fact that they were not brought to the [court's] attention would not argue against application of collateral estoppel, as long as there had been an equal incentive to litigate the issue, and if there were no other factors making estoppel unjust.
767 F.2d at 1222.

"It must be remembered that in the first suit between these parties Johnstone sued Amoco, seeking to reform certain aspects of their franchise arrangements. When the Nora Station lease expired by its own terms and bargaining in accordance with the PMPA produced no contract of sale, the Nora Station reverted to Amoco, and the controversy was over. Johnstone had no further legal interest in the Nora Station, and it would therefore be futile to try to reform a franchise that was no longer in existence. If Johnstone, as he claims, had valid defenses to any termination by Amoco the first case provided him with the time and place to offer these defenses. The issue of the

> Nora Station franchise's viability was put in issue by Amoco. The court then found the station's status had been resolved and all was moot. There was little more that Judge Dillin could say about the matter if the defendant held back and did not deny mootness nor offer any of the defenses he now claims to have had to demonstrate that the case was not moot because the PMPA had not been properly compiled with by Amoco.
>
> "It was up to Johnstone either to show why his claim was not moot or suffer the loss of that part of his own lawsuit as to the Nora Station."

See p. 11a, infra.

It is clear that the Seventh Circuit either ignored the proof required of Amoco, or else has determined to judicially modify those requirements and dilute the duty placed on franchisors in PMPA cases. The Seventh Circuit talks of Johnstone's failure to prove his PMPA "defenses" in the MMP case when the PMPA in fact requires just the opposite: that Amoco, as franchisor, prove its compliance. In one breath the Seventh Circuit has effectively altered the level of protection intended by Congress to be accorded by PMPA. Moreover, the

opinion directly conflicts with two opinions in other Circuits which have enforced the clear language of the PMPA and has required that franchisors carry the burden of proving that they have complied with the PMPA.

In Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565 (11th Cir. 1987), the Eleventh Circuit considered a franchisee's claims under the PMPA. The franchisee had received notice of termination from the franchisor which set forth several grounds for the termination under the PMPA. The franchisee sought injunctive relief and damages. The district court in that case denied the franchisee's motion for summary judgment, but granted the franchisor's summary judgment motion on the PMPA. The Eleventh Circuit found that the district court had misapplied the standards for summary judgment set forth in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), which discusses the traditional burden of proof

requirements which a plaintiff must meet in order to avoid the entry of summary judgment against him. The Eleventh Circuit held that the the district court overlooked the burden of proof requirements set forth in the PMPA.

> "Clinkscales met his burden of production by demonstrating that Chevron terminated the franchise agreement. The burden then shifted to Chevron to demonstrate that the termination was valid under the PMPA. The district court erred in concluding that Chevron was not required to make this showing.
>
> "The Court's opinion in Celotex is consistent with the burden of proof for summary judgment under the PMPA. The Court in Celotex held that Rule 56(c) mandates the entry of summary judgment, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, **and on which that party will bear the burden of proof at trial.**' 106 S.Ct. at 2552-53 (emphasis added). ...[T]o prevail on its own motion for summary judgment, Chevron had to demonstrate that the termination was lawful under the PMPA."

831 F.2d at 1569.

It is obvious, then, that the Eleventh Circuit has upheld the application of the

burden of proof requirements of the PMPA while the Seventh Circuit in this case has not.

The Tenth Circuit has also spoken on the PMPA burden of proof provisions. In Ewing v. Amoco Oil Company, 823 F.2d 1432, at 1436 (Tenth Cir., 1987), the court considered a case in which a franchisee sought a preliminary injunction against a franchisor which had given him notice of termination pursuant to the PMPA. The district court granted the injunction and the Tenth Circuit upheld that decision, stating in response to Amoco's arguments on appeal that, "...in any PMPA action, including an action for an injunction, the franchisor bears the burden of establishing its compliance with the statute." Id., at 1436.

The Seventh Circuit's opinion below has set a confusing precedent which is likely to generate even further confusion within the Seventh Circuit and among the other Circuits.

It is precedent which is clearly at odds with the clear intent of Congress found in the PMPA, and with the interpretations of the PMPA found in the Tenth and Eleventh Circuits. Consequently, review by this Court is essential.

II.

The decision below is so clearly erroneous in light of 15 U.S.C. Sec. 2805(e) that a review of the decision is warranted.

The Seventh Circuit's decision affirmed the District Court's application of the issue preclusion doctrine when it is plain that given the strictures Sec. 2805(e) of the PMPA places upon courts dealing with PMPA cases, the prerequisite elements of the issue preclusion doctrine could not be fulfilled. This is so even assuming, arguendo, that the prior findings and conclusions in the MMP case included a ruling on any PMPA issues.

Section 2805(e) of the PMPA states:

"(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, **the court may not compel a continuation or renewal of the franchise relationship** if the franchisor demonstrates to the satisfaction of the court that --

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business--

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by

> section 2802 of this title." [emphasis added.]

Amoco based its nonrenewal of Johnstone's Nora Station franchise on the grounds provided for at Section 2802(b)(3)(D)(i)(IV) -- that renewal of the franchise relationship would be uneconomical, etc. Thus, assuming that the propriety of Amoco's nonrenwal of Johnstone was adjudicated in the MMP case as was so held by the Seventh Circuit, then there must have been a showing that, indeed, the renewal of the franchise relationship would be uneconomical to Amoco. Consequently, that section of the PMPA quoted above provides that the District Court in the MMP case could not have compelled a continuation of the franchise, and therefore the issues relating to the MMP Rider in that case were indeed moot.

But the PMPA has requirements that go beyond mere approval or disapproval of certain grounds for termination or nonrenewal of a

petroleum franchise. Even if there are proper grounds for such termination or nonrenewal, in some cases there are other requirements that the franchisor must comply with under the PMPA. This explains, therefore, the purpose behind Section 2805(e) quoted above, and why subsection (2) above provides that if there is a showing of proper grounds, then the court may not compel a continuation of the franchise, but that a franchisee may still seek actual damages if there has been any other aspect of the PMPA which has been violated. For example, if a nonrenewal is based on one of the grounds enumerated in Section 2805 above, but the franchisee was not given proper notice under Section 2804, then, nevertheless, the nonrenewal is prohibited. Section 2805(e), though, limits the franchisee's remedies in those instances to actual damages, and not court-ordered continuation of the franchise.

In this particular case, Amoco was also required to present Johnstone with a bona fide offer to sell its interests in the premises as a precondition to an allowable nonrenewal. (15 U.S.C. 2802(b)(3)(D)(iii).) However, if Amoco did not do so (as Johnstone argues), then Johnstone's remedies are limited to actual damages -- not a continuation of the franchise relationship. If there could be no continuation of the franchise relationship, then the issues relating to the MMP Rider with respect to the Nora Station were indeed moot as Judge Dillin concluded in that case. That's where the scope of Judge Dillin's conclusions must stop, however, for any further consideration of the PMPA issues in the MMP case would have been utterly irrelevant.

In its opinion, the Seventh Circuit correctly cites its own precedents to define the "generally recognized principles" of collateral estoppel or issue preclusion:

"In County of Cook v. Midcon Corp., we set forth the generally recognized principles:

> In general, collateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court's judgment, and (4) those issues are identical to issues raised in the subsequent suit.

773 F.2d 892, 898 (7th Cir. 1985).

* * *

> In Frye v. United Steelworkers of America, 767 F.2d 1216, 1220-21 (7th Cir.), cert. denied, 474 U.S. 1007 (1985), this court elaborated on the use of collateral estoppel, although in the context of administrative agency decisions. We held that an express finding of fact or law in an earlier judgment will have a preclusive effect if that finding was necessary and essential to the earlier judgment."

(p. 8a, infra.)

It is abundantly clear, on its face, that the decision of the Seventh Circuit did not consider the strictures placed upon the scope of Judge Dillin's findings in the MMP case by

Section 2805(e) when it decided to uphold the ruling of preclusion by the lower court.

Please consider this:

(a) the MMP case did not involve any claims under the PMPA, but rather, Judge Dillin ruled that because there was a termination of the franchise relationship pursuant to PMPA, the issues in the MMP case were moot as respecting the Nora Station;

(b) Section 2805(e) of the PMPA did not allow Judge Dillin to compel a continuation of Johnstone's franchise in any event, so indeed, as Judge Dillin ruled, the issues relating to the MMP Rider, which was a part of the franchise agreement, were moot;

(c) The PMPA provided other remedies to Johnstone other than a court-ordered continuation of the franchise (Section 2805(e)(2)) -- remedies which had nothing whatsoever to do with the issues in the MMP case.

It is clear, therefore, that under the Seventh Circuit's own standards for collateral estoppel, any implied findings by Judge Dillin concerning these other remedies belonging to Johnstone were not "necessary" to Judge Dillin's judgment (Midcon and Frye) or "essential" thereto (Frye). Johnstone should have been allowed his day in court on his PMPA claims. He was denied that right by the District Court in this case, and the Seventh Circuit's decision to affirm the District Court.

The Seventh Circuit's decision is so fundamentally wrong on its face that review by this Court is essential to correct the gross injustice. The PMPA is a remedial statute designed to protect individuals just like Johnstone. Not only has Johnstone been denied the remedy provided, he has even been denied his opportunity to have his case heard.

CONCLUSION

For these reasons, the petitioner, Donald V. Johnstone, respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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